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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ERNEST ODONNA HERNANDEZ, Defendant and Appellant.	B205703 (Los Angeles County Super. Ct. No. VA098324)

APPEAL from a judgment of the Superior Court of Los Angeles County. Margaret M. Bernal, Judge. Affirmed.

Jennifer A. Mannix, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

Ernest Odonna Hernandez appeals from his convictions for making criminal threats and interfering with an executive officer. We affirm.

FACTS AND PROCEEDINGS

Appellant Ernest Odonna Hernandez and Gayle Anderson, who were romantically involved for 19 years, had three children, the youngest named A. Anderson ended their relationship in October 2004. Because appellant had a history of domestic violence against Anderson, she was fearful of him after they broke up. In June 2006, Anderson obtained a restraining order against appellant that required him to stay at least 100 yards from her. She also successfully sought modification of the custody order governing appellant's visitation with A. to restrict his visits to a monitored setting with at least 24 hours' notice to the monitor before each visit.

Appellant did not abide by the custody order's restrictions. Instead, in November 2006, he began making profanity-laced phone calls to Anderson, demanding she let him see A. The calls frightened Anderson. The Monday before Thanksgiving, appellant went to Anderson's home and, standing about 30 feet from her front door, called out to his and Anderson's older son. The boy went outside and talked to appellant, while Anderson watched from inside her house. Later that evening, appellant called Anderson and angrily demanded that she let him see A. on the Saturday after Thanksgiving or he would kick down Anderson's front door and take A. away. Because appellant had once before broken through Anderson's door, she took his threat seriously. Nevertheless, she did not submit to appellant's demand and did not let him see A. on Saturday.

The next day, appellant called Anderson repeatedly, leaving about half a dozen recorded messages. One message threatened "you are gonna die, mother fucker." Alarmed, Anderson called sheriff's deputies, who went to her house and, after listening to the messages, decided to arrest appellant.

Four deputies went to appellant's home, where he invited them in. Once inside, a deputy told appellant he was under arrest. Appellant replied, "You are not arresting me.

That is bullshit." Several times, the deputy told appellant to stand up from the couch, turn around, and place his hands behind his back, but appellant repeatedly refused, telling the deputies he was not going to jail without a fight. A second deputy warned appellant they would use a taser on him if he continued to disobey their orders. Undeterred, appellant remained on the couch and said "If you try to arrest me, you suffer the consequences." The senior deputy ordered deputy Christian Selecman to fire the taser at appellant. The taser's darts attached to appellant's shirt. Flailing about, appellant tried to remove the darts and as he did so, two deputies tried to handcuff him. Wrestling on the couch with the deputies, appellant tried to pull his hands from their grasp. One deputy saw appellant reaching for a knife and, warning the other deputies, aimed his gun at appellant. Deputy Selecman delivered a second jolt to appellant from the taser, at which point appellant put his hands up and said "I give up."

The People charged appellant by information with making criminal threats against Gayle Anderson and resisting executive officer Christian Selecman. The People also charged appellant with making annoying phone calls to Anderson and disobeying the restraining order she had against him.[1] Appellant pleaded not guilty. Trial was by jury, during which appellant represented himself. During the trial, appellant changed his not guilty pleas to guilty for making annoying phone calls and violating the restraining order. The jury thereafter convicted appellant of making criminal threats against Anderson (Pen. Code, § 422) and resisting executive officer Selecman (Pen. Code, § 69). The court sentenced appellant to state prison for 17 years and 4 months. (Appellant had suffered prior convictions and prison terms not at issue which contributed to the length of his sentence.) This appeal followed.

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[1] The People also charged appellant with making criminal threats against deputy Selecman and another woman besides Anderson, but the jury acquitted appellant of both counts.

DISCUSSION

1. *Sufficiency of Evidence of Criminal Threats Against Anderson*

Penal Code section 422 outlaws threatening to commit a crime against another person that makes that person fear for his or her safety. Section 422 states:

> "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety . . . ." (§ 422.)

Appellant left the following messages on Anderson's answering machine:[2]

- "Hey, fucken tramp, send those mother fuckers back here. I'm fucken here right now bitch and I'm going to fuck them all up!"

- "Listen to me Gayle, I'm commandeering all your fucken assets every fucken' piece of property you own. Everything your family owns. Everything belongs to me you fucken tramp ass bitch. Your through man, I am sick and tired of your fucken sick ass fucken 666 ways eh. Your fucken through, you fucken tramp ass bitch."

- "Hey, this is Nelson I just want you to know you know what fucken bitch ass ways have fucken made you fucken available for the world to know who the fuck you are. You fucked up so much, Gayle, that you don't even understand. I got every fucken thing covered, I got federal files you cannot erase. I got so much shit that you don't even fucken know about, bitch. And I'm going to take you and the government down myself, mother fucker. Because that's what you wanted to fuck with me. Now you know for a fucken fact that you're fucken their ass."

- "Listen to me I'm like the wind. Although you feel my presents [sic] you don't know where I'm coming from or where I'm going. I run the south, north, east and west."

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[2] Because of the sufficiency of the evidence claim, we recite an unedited version.

- "I'm the king of kings Gayle, fucken don't you understand you fucked with the wrong person for too long, now you're going to suffer the consequences."

- "You know how you always said I was a wetback, you never pronounced my name right, you don't even know what Albaro means. Albaro means "faithful", Gayle. You know what Semperfi means, "all faithful", so fuck you, you cunt ass bitch."

- "What happened? Your good old boys didn't come over here, Gayle? I've been waiting for Sergeant Clark. He's supposed to be showing up. I mean what the fuck, bitch. You fucken coward ass mother fuckers. Nobody's fucken showing up, why because they know what time it is. It's fucken my world you tramp ass bitch. I'm sick of you Gayle I never going to fucken hear your voice again. I cannot stand your fucken ass. That's why I know your going to hell, your not going to be nowhere where I'm at."

- "Since you want to be the way you are listen to me since you want to be the way you are. I'm going let you know something. There's a place in Riverman, Illinois five stories underground I think you'll enjoy it very much for the rest of your life."

- "Listen to me I hope your attitude changes quick. I've got armies of attitude adjuster ready to do my will. I don't have to listen to nobody Gayle, the government listens to me now. So get it through your head, there's nowhere you could run, there's no where you could hide. You're going to give me my daughter or I'm gonna go get her myself."

Appellant contends insufficient evidence supported his conviction for making criminal threats against Anderson because his threats were insufficiently "unequivocal, unconditional, immediate, and specific" for Anderson to genuinely fear for her safety. He characterizes his messages as overheated rants reflecting his frustration over an acrimonious custody battle, and not true threats that she should have feared he might act upon. In support, he cites *People v. Teal* (1998) 61 Cal.App.4th 277, 281, which states:

"[S]ection 422 is not violated by mere angry utterances or ranting soliloquies, however violent." (*Teal,* at p. 281.)[3]

Appellant's contention is unavailing because his threats need not have been models of clarity to be criminal. *In re Ryan D.* (2002) 100 Cal.App.4th 854, explained: "To constitute a criminal threat, a communication need not be *absolutely* unequivocal, unconditional, immediate, and specific. . . . [T]he test is whether, in light of the surrounding circumstances, the communication was *sufficiently* unequivocal, unconditional, immediate, and specific as to convey to the victim a gravity of purpose and immediate prospect of execution." (*Id.* at p. 861; see also *People v. Bolin* (1998) 18 Cal.4th 297, 339-340; *People v. Butler* (2000) 85 Cal.App.4th 745, 753 ["it is the circumstances under which the threat is made that give meaning to the actual words used. Even an ambiguous statement may be a basis for a violation of section 422."].)

The jury could consider the context and circumstances of appellant's threats in assessing Anderson's perception of them. (*People v. Mosley* (2007) 155 Cal.App.4th 313, 324; *People v. Butler, supra,* 85 Cal.App.4th at p. 753.) One circumstance the jury could weigh here was the history of domestic violence between appellant and Anderson. (*People v. McCray* (1997) 58 Cal.App.4th 159, 172-173.) The words of someone with an assaultive history may be understood differently than those of someone with no prior violent behavior. It stands to reason that the jury could also consider appellant's willingness to violate Anderson's restraining order against him and his disregard for the custody order governing his visits with their daughter, A. Appellant's challenge to the sufficiency of the evidence asks us to substitute our judgment for the jury's in weighing the seriousness of appellant's threats against Anderson. He asks us, for example, to substitute our views for the jury's in deciding what he meant when he compared himself

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[3] Appellant's reliance on *Teal's* language is misplaced because it is dicta. The issue in *Teal* was whether the defendant needed to know with certainty that his victim had received the threat. Answering no, the *Teal* court explained that its answer nevertheless did not mean that purely private rants ("ranting soliloquies") having no reasonable chance of reaching the victim were criminal. (*Teal, supra,* at p. 281.)

to the wind, or whether he was blustering when he referred to his "armies of adjusters," or was alluding to a federal prison in Illinois when he predicted Anderson's burial five stories below ground. Deciphering the messages appellant intended to convey and Anderson's interpretation of what he said was the jury's job, not ours. (*People v. Cervantes* (2001) 26 Cal.4th 860, 866; *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1339.) His claim of insufficient evidence thus fails.

2. *No Duty to Instruct With Penal Code 148 as Lesser Included Offense of Section 69*

The People charged appellant with violating section 69. That statute criminalizes acts by any "person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty . . . ." (§ 69.) Noting that a defendant can violate section 69 in two ways, cases apply a shorthand description to the two prongs as "attempting to deter with threats" and "actual resistance with force or violence." (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 984-985 (*Carrasco*); *People v. Lacefield* (2007) 157 Cal.App.4th 249, 255 (*Lacefield*).)

Appellant contends the trial court erred in not instructing the jury with section 148, subdivision (a)(1) as a lesser included offense of his alleged violation of section 69. (*People v. Barton* (1995) 12 Cal.4th 186, 198, fn. 7, 204 [court has sua sponte duty to instruct on lesser included offenses supported by substantial evidence].) Section 148 states: "Every person who willfully resists, delays, or obstructs any . . . peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment" is guilty of a misdemeanor. Appellant correctly notes that section 148 is a lesser included offense of the second prong of section 69 which outlaws actual resistance – the difference being resistance under section 69 involves force or violence, but resistance under section 148 does not. (*Carrasco, supra,* 163 Cal.App.4th at p. 985.)

The trial court did not err. First, the People framed their case against appellant as a violation of the first prong of section 69 – attempting to deter – for which section 148 is not a lesser included offense. (*Carrasco*, *supra*, 163 Cal.App.4th at pp. 984-985; *Lacefield*, *supra*, 157 Cal.App.4th at p. 255.) In closing argument, the prosecutor urged the jury to convict appellant because he had "trie[d] to prevent [deputy Selecman] from doing his job with threats of violence. 'I am not getting arrested without a fight.' And, 'you are gonna suffer the consequences.' " And consistent with the People's theory of the case, the court instructed the jury on the attempting-to-deter prong of section 69.

Appellant contends his trial nevertheless put before the jury his purported violation of section 69's second prong – actual resistance with force or violence –because the People's information alleged he violated both prongs of section 69.[4] The information stated the prongs of section 69 conjunctively: Appellant "did unlawfully attempt by means of threats and violence to deter and prevent [executive officer] Christian Selecman . . . from performing a duty imposed such officer by law, *and* did knowingly resist by the use of force and violence said executive officer in the performance of his/her duty." (Italics added.) Appellant's contention fails, however, because conjunctive pleading does not yield the outcome he seeks. *People v. Moussabeck* (2007) 157 Cal.App.4th 975, explains why. Conjunctive pleading is at the prosecutor's election and, presumably, for

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[4] Appellant's reasoning for this contention relies on the accusatory pleading test for defining a lesser included offense. See generally *People v. Lopez* (1998) 19 Cal.4th 282, 288-289 ["To determine whether a lesser offense is necessarily included in the charged offense, one of two tests (called the 'elements' test and the 'accusatory pleading' test) must be met. The elements test is satisfied when ' "all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense." [Citation.]' [Citations.] Stated differently, if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former. [Citations.] [¶] Under the accusatory pleading test, a lesser offense is included within the greater charged offense ' "if the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed." [Citations.]' "].)

the prosecutor's convenience. It does not, however, obligate the prosecutor to prove the defendant violated each variant of the criminal statute at issue. *Moussabeck* states:

> "[W]hen the accusatory pleading describes the crime in its statutory language, but in the conjunctive (e.g., inflicted physical pain *and* mental suffering; inflicted corporal punishment *and* an injury), the allegation is treated as being in its statutory disjunctive. As noted in *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1532-1533 [], '[w]hen a crime can be committed in more than one way, it is standard practice to allege in the conjunctive that it was committed every way. Such allegations do not require the prosecutor to prove that the defendant committed the crime in more than one way. [Citation.]' In such cases only the statutory elements test is relevant in determining if an uncharged crime is a lesser included offense of that charged. [Citations.]" (*Moussabeck,* at p. 981.)

Applying *Moussabeck* here, the information's conjunctive pleading did not mean the People tried appellant for violating section 69 in both ways.

In any case, even if the second prong of section 69 were before the jury, no substantial evidence supported instructing the jury with section 148. Appellant concedes he tried to pull the darts from his shirt, wrestled on the couch with the deputies as they tried to handcuff him, and tried to pull his hands from their grasp. (See *Carrasco, supra,* 163 Cal.App.4th at pp. 985- 986 [struggling and wrestling with officer is resisting by force or violence].) Based on appellant's concession, the jury had no rational basis to conclude he resisted the deputies, but did so without using force or violence. Thus, section 148, which requires resistance *without* force or violence, did not apply.

DISPOSITION

The judgment is affirmed.

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RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

BIGELOW, J.